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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry, representing cable television system owners and operators and cable program networks. NCTA's members also include equipment suppliers and others interested in or affiliated with the cable industry.

INTRODUCTION AND SUMMARY

This proceeding is aimed at implementing certain provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") that deal with access to vertically integrated cable programming services by unaffiliated multichannel video program distributors.

Specifically, Section 628 of the Act prohibits conduct (1) by vertically integrated programmers, if (2) the conduct is unfair, and (3) the effect of such conduct is to prevent or significantly hinder a multichannel video program distributor from providing video programming to subscribers. The Commission's task is to give meaning to these three threshold requirements, in its regulations and in its enforcement of Section 628. But only conduct that meets all three tests can ultimately be prohibited.

Congress believed that vertically integrated program networks -- that is, networks owned in some part by cable operators -- had both the incentive and the ability to favor their own affiliated cable operators and to discriminate against unaffiliated distributors.[1/] Congress also believed that a competitive marketplace of multichannel distributors would, ultimately, be more desirable and effective than rate regulation in ensuring reasonable rates and good customer service for consumers.[2/] Therefore, Congress adopted measures to remedy instances in which vertically integrated programmers have in fact acted unfairly on their supposed incentives to favor their own affiliates and have effectively prevented unaffiliated distributors from competing.

Section 628 of the Act identifies and deals specifically with two ways by which vertically integrated program networks

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1/ Act, Section 2(a)(5).

2/ Report of the Committee on Energy and Commerce of the House of Representatives, H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 30 (1992).

might seek to favor their affiliated cable operators. One such way is to enter into exclusive contracts with cable operators. The other is to discriminate among cable operators and other distributors with respect to the price, terms and conditions under which such networks sell their programming.

In neither case, however, does the Act flatly prohibit such conduct -- nor would it be sensible to do so. Over the years, courts, antitrust experts and economists have paid particular attention to exclusive contracts and price discrimination and have generally found that, more often than not, such practices are wholly legitimate and promote rather than inhibit competition. Therefore, the Act, while identifying price discrimination as a form of prohibited conduct, identifies several categories of price differentials that typically are not anticompetitive and should not be prohibited. And while exclusive contracts between vertically integrated programmers and cable operators may sometimes constitute prohibited conduct, the Act identifies several potentially pro-competitive effects of such agreements and authorizes the Commission to permit them where it finds that they are "in the public interest."[3/]

Thus, the Act does not prohibit the sorts of vertical restraints and differential prices, terms and conditions that promote competition and efficiency and would generally be upheld under the antitrust laws. It only prohibits vertically

3/ Act, Section 628 (c)(2)(D).

integrated programmers from engaging in "unfair" conduct, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[4/] This prohibition, nevertheless, affords remedies to competing multi-channel distributors that go beyond what is already available under the antitrust laws. Procedurally, the Act allows distributors who allege injury at the hand of a vertically integrated programmer to avoid the delay and expense of protracted antitrust litigation and to obtain expedited consideration and relief from the Commission.

The Commission's Notice of Proposed Rulemaking reflects an awareness that Congress did not prohibit all price differentials and exclusive contracts and a sensitivity to the difficult task of singling out only those cases where such price differentials and exclusive contracts have no pro-competitive justification and adversely effect competitors. The Commission has correctly identified the broad overriding principles embodied by the Act. And it properly seeks to craft workable procedures for dealing with complaints under this provision.

Between the broad principles and the proper procedures, the Commission is searching for standards to help determine, in individual cases, whether particular conduct is unfair and is

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4/ Id., Sec. 628(b).

prohibited by the Act. Especially with respect to price discrimination, however, there are no off-the-rack, readily available standards for applying the program access provisions of the Act. Common carrier regulatory principles do not readily fit the task at hand. The Robinson-Patman Act's price discrimination provisions, while relevant in certain respects, are not identical to the provisions of Section 628, either in their specific terms or in their intent -- which was considerably more protectionist and less pro-competitive in nature than the Cable Act.

In the end, antitrust principles and precedents can and should inform the Commission's application of the Act's terms, but the Commission will simply have to develop its own standards and precedents by applying those terms on a case-by-case basis. Those principles and precedents -- as well as the legislative history of Section 628 -- confirm that the competitive harm that must be shown before discriminatory conduct can be prohibited can only occur if (1) the discrimination is between competing buyers in the same market, and (2) the discrimination affects the disfavored competitor's prices at the retail level. As a procedural matter, the Commission's proposal to apply Section 628's price discrimination requirements <u>prospectively</u> and not to disturb existing contracts is sound and essential. Only in this way can programmers that currently charge differential prices adjust to non-discriminatory pricing, in a manner that covers their costs plus a reasonable profit.

With respect to exclusive contracts, antitrust precedents provide appropriate standards for determining whether such contracts, in particular circumstances, are in the "public interest" and, therefore, are permissible. The criteria set forth in the Act for making such public interest determinations reflect the balancing of competitive effects that antitrust courts conduct in examining exclusive contracts and other non-price vertical restraints.

I. THRESHOLD REQUIREMENTS: SIGNIFICANT HARM AND VERTICAL INTEGRATION

The Commission properly identifies, at the outset, two overriding threshold requirements that must be met before any exclusive contract, price discrimination, or other conduct can be deemed to violate that Act. First, only conduct that constitutes

> unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers[5/]

is prohibited by Section 628. Second, with respect to agreements and relationships between cable operators and programmers, only agreements and practices involving programmers "in which a cable operator has an attributable interest" are within the ambit of this prohibition.

5/ Section 628 (b) (emphasis added).

A. Unfair Competition and Significant Harm

The Commission, in its Notice, notes that Section 628(b)'s prohibition is limited to "unfair" conduct that prevents or significantly hinders a multichannel distributor from providing programming, and it asks how this critical threshold requirement interacts with other provisions of Section 628 that appear to prohibit certain specific practices."[6/] Section 628(c), for example, directs the Commission, in implementing Section 628(b)'s general prohibition, to proscribe exclusive contracts and price discrimination in certain circumstances. How do the prohibitions of exclusive contracts and price discrimination in Section 628(c) mesh with Section 628(b), which only prohibits unfair conduct that significantly harms a competitor?

The answer is that Section 628(c) provides criteria for determining, in particular cases, whether certain forms of conduct -- such as price differentials and exclusive contracts -- are to be deemed "unfair" conduct. But even if the conduct is determined to be unjustified and unfair, it is not prohibited by Section 628(b) unless it also prevents or significantly hinders a multichannel video programming distributor from providing programming to subscribers or consumers.

For example Section 628(c)(2)(B) provides that price discrimination by vertically integrated programmers is to be deemed

6/ Notice, para. 10.

a form of prohibited unfair conduct, under the Commission's rules, unless it is justified under one of four enumerated exceptions. Price differentials that are encompassed by one or more of those exceptions do <u>not</u> constitute unfair conduct and are outside the ambit of Section 628's prohibition. But even if such a differential does not fall under any of the exceptions and is therefore within the category of unfair practices defined by the Act, it will not constitute prohibited conduct in any particular case unless it <u>significantly hinders</u> the ability of a multichannel distributor to compete.

Similarly, Sections 628(c)(2)(C) and (D) require that the Commission's rules prohibit, in certain circumstances, exclusive contracts. Under Section 628(c)(2)(C), exclusive contracts between vertically integrated programmers and cable operators that give cable operators the right to prevent distribution of programming by others even in areas not served by them or by any other cable system are to be viewed by the Commission, without exception, as unfair conduct. Under Section 628(c)(2)(D), exclusive contracts between vertically integrated programmers and cable operators that provide exclusivity in their service areas or in areas served by other cable systems are also to be viewed as unfair conduct, unless the Commission finds that they are in "the public interest." But even if the Commission is unable to make an affirmative determination that an exclusive contract is somehow in the public interest -- even if an exclusive contract falls within the category of unfair conduct prohibited by the Act -- such a contract will not be prohibited unless an aggrieved multichannel distributor can demonstrate that its ability to provide programming to subscribers has been significantly hindered.

In this respect, what matters is not whether or not conduct by a particular vertically integrated programmer hinders or prevents a multichannel distributor from providing that programmer's programming to subscribers. What matters is whether the conduct significantly hinders or prevents the multichannel distributor from providing programming at all -- from operating in the marketplace as a distributor of video programming to subscribers. Any exclusive contract entered into by a programmer with a cable operator would, for example, prevent other distributors in the area of exclusivity from providing that programmer's programming to subscribers. But that is not the sort of harm that meets the Act's threshold requirement. As Congressman Tauzin, the principal sponsor of the amendment that became Section 628, stated during the floor debate, "Our amendment says that exclusive programming that is not designed to kill the competition is still permitted."[7/]

Moreover, a mere showing by a multichannel distributor that it is unable to compete successfully in the marketplace is not sufficient to demonstrate that particular conduct on the part of a programmer should be prohibited and remedied. There must be

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7/ Cong. Rec. H.6534 (daily ed., July 23, 1992), (emphasis added).

sufficient evidence to demonstrate a causal link between the conduct and the harm; the inability to compete must be the "effect" of the unfair conduct.[8/] Nothing in the Act requires programmers to act affirmatively to protect or guarantee the competitive survival of all multichannel distributors.

In sum, certain practices will under the Act and the Commission's rules constitute the sort of unfair conduct that is within the scope of Section 628's prohibition. But unless an aggrieved party also can show that, as a direct result of such conduct, it has been prevented or significantly hindered from distributing programming to subscribers, the conduct will not be prohibited and no remedy will be available.

B. Vertical Integration

The Commission states that

> [w]ith respect to the intended objectives and scope of Section 628, we believe that the proscriptions pertaining to satellite cable programming vendors are apparently focused on practices that are pursued by vertically integrated entities."[9/]

The Commission's conclusion is correct. It is supported by the language of Section 628, and it is confirmed by the legislative findings in Section 2 of the Act, which indicate a specific concern that vertically integrated programmers have the incentive and ability to favor their affiliated programmers. Section

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8/ Act, Section 628(b).

9/ Notice, para. 8.

628(b), by its terms, only prohibits the conduct of satellite cable programmers "in which a cable operator has an attributable interest." And Section 628(c) prohibits certain specific conduct -- exclusive contracts and discrimination -- only when engaged in by a programmer "in which a cable operator has an attributable interest."

1. Section 628 Does Not Restrict Relationships Between Cable Operators And Non-Integrated Programmers.

Section 628(b), in addition to prohibiting unfair conduct by vertically integrated _programmers_, also prohibits such conduct _by_ any _cable_ _operator_, whether or not it is vertically integrated. What this means is that certain unilateral, unfair conduct by a cable operator that inflicts serious competitive injury on a multichannel distributor is within the ambit of Section 628, wholly apart from any relationships between the cable operator and cable programmers.

It cannot, however, reasonably be construed to restrict relationships between cable operators and _non_-vertically integrated programmers. If an exclusive contract, favorable price or other arrangement between a non-integrated programmer and a cable operator were to be deemed unfair conduct prohibited by Section 628, on the grounds that Section 628(b) applies to unfair conduct by any cable operator, then the provisions of Section 628(c) that specifically prohibit such arrangements only when they involve vertically integrated programmers would be meaningless. Section 628 can only be read to apply to operator-programmer relationships involving vertically integrated programmers.

2. <u>Conduct of Vertically Integrated Programmers that Is No Different from Conduct, in Similar Circumstances, of Non-Integrated Programmers Is Not "Unfair" and Is Not Prohibited by the Act</u>

In light of the Act's evident focus only on vertically integrated programmers, the Commission asks "whether Section 628 is intended to require vertically integrated firms to conduct themselves in a manner similar to non-integrated firms, thereby minimizing the anticompetitive potential of integration" or whether, instead, "the regulations should cause vertically integrated firms to function differently than non-integrated firms."[10/] The underlying premise of the Act, as previously noted, is that vertically integrated programmers have a unique ability and incentive to favor affiliated cable operators and to discriminate against unaffiliated multichannel distributors. The Act is meant to prevent programmers from acting on those unique incentives -- from acting in a manner different from how they would act if they had no such incentives.

It follows that conduct on the part of a vertically integrated programmer that is no different from conduct, in similar circumstances, of a non-integrated programmer should not be prohibited as "unfair." There would be no basis for

10/ Notice, para. 8.

concluding that such conduct was the result of the vertically integrated programmer's supposed anticompetitive incentives. Moreover, to prohibit a vertically integrated programmer from acting in the same manner as a non-integrated programmer would prevent it from operating in what might be the most efficient manner -- to the ultimate detriment of consumers.

Accordingly, it should be a defense to <u>any</u> complaint brought under Section 628 that the allegedly unfair conduct of the vertically integrated programmer was no different than the typical behavior of non-integrated programmers in similar circumstances. Such conduct would, in light of the legislative objectives, not be "unfair" and therefore would not survive the threshold test that only <u>unfair</u> conduct that significantly hinders or prevents a multichannel distribution from providing programming to subscribers is prohibited.

3. <u>Only Conduct of Vertically Integrated Programmers that Favors Their Commonly Owned Cable Operators Should Be Deemed "Unfair".</u>

Moreover, because Section 628 is intended to prevent vertically integrated programmers from acting on their unique incentives and abilities to favor their commonly owned cable operators, only conduct that adversely affects a multichannel distributor <u>to the competitive benefit of a programmer's commonly owned cable system</u> should be deemed "unfair." If a programmer, for example, entered into exclusive contracts with unaffiliated cable operators, or provided its programming at favorable prices, terms or conditions to an unaffiliated cable operator, such practices should be outside the scope of unfair conduct prohibited by the Act. Whatever the purpose of the exclusive contracts or the differential prices, terms and conditions, it clearly would not, in such circumstances, be to give the programmer's commonly owned cable system an unfair competitive advantage.

Therefore, in light of the scope and purposes of Section 628, the Commission should rule that only where a programmer grants exclusivity, favorable prices, terms and conditions, or other favorable treatment to a cable operator that is vertically integrated with that specific programmer can such conduct constitute an unfair practice under the Act. And only distributors of multichannel programming who are prevented from obtaining programming because of such favorable treatment by programmers of their own affiliated cable operators can complain of unfair conduct under the Act.

II. WHEN IS A PROGRAMMER VERTICALLY INTEGRATED?

While the Act makes clear that only conduct involving vertically integrated programmers is meant to be prohibited by Section 628, it provides little guidance as to how to determine whether a programmer is, in fact, vertically integrated. The prohibition applies to conduct by programmers "in which a cable operator has an attributable interest," but does not define what constitutes an "attributable interest."

As the Commission points out, the legislative history of the Senate bill's program access restrictions (which were not ultimately enacted) indicates an intent "that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate."[11/] The House version, which was adopted, has no accompanying report language to clarify how attribution is to be defined. The rules referred to in the Senate Report are the ownership attribution standards for rules limiting ownership of broadcast stations. Those rules generally treat ownership of more than five percent of a broadcasting company's voting stock as an attributable ownership interest for purposes, for example, of the broadcast multiple ownership rules and the rules limiting cross-ownership of broadcasting and other media interests.

But it does not necessarily follow that this standard should apply across the board whenever the Commission needs to define attributable ownership, for whatever purpose. What constitutes a _de minimis_ and essentially irrelevant ownership interest for some purpose may be different from what should be deemed _de minimis_ in other contexts. As the Commission has recognized in other contexts, the appropriate standard depends upon the purposes of the rule to which it applies.

The purposes of the broadcast ownership rules are different, for example, from the purposes of the statutory prohibition on

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11/ Report of the Senate Committee on Commerce, Science and Transportation, S.Rep. No. 102-92, 102d Cong., 1st Sess. 78 (1991).

common ownership of cable systems and telephone companies operating in the same area.[12/] The broadcast rules are, in large part, designed to ensure diversity of programming by preventing a single entity from influencing too many media outlets. Attribution of ownership, for this purpose, is based on whether a particular entity's ownership of a broadcast station is sufficient to influence, to any extent, the programming on that station.[13/]

The cable/telco cross-ownership rule has a different purpose. That rule is based on a concern that a telephone company that owns an interest in a cable operator in its service area will have the incentive and ability to discriminate against other competing cable operators in the provision of essential telephone facilities as well as to cross-subsidize its own cable affiliate with telephone ratepayer revenues.[14/]

Because of these different purposes, the attribution standards for these two sets of rules have never been identical. The Commission has generally recognized that the amount of ownership of a cable system that is necessary to give a telephone company the incentive to use its telco operations to favor that system may be less than what is necessary to give owners of broadcast

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12/ 47 U.S.C. Section 533(b).

13/ See, e.g. Attribution of Ownership Interests, 97 F.C.c.2d 997, 1004-05 (1984).

14/ See, e.g., Second Report and Order, 7 F.C.C. Rcd 5781, 5819 (1992).

station stock the ability to influence the programming on that station. Thus, for many years, the broadcast limits were set at five percent stock ownership, while the cable/telco limits remained at one percent.

Recently, the cable/telco limit was raised to the same five percent level as the broadcast rules, although for reasons that have nothing to do with the broadcast rules.[15/] Still, the Commission retained differences between the two standards. For example, the broadcast rules provide that if a single entity owns more than 50 percent of the voting stock of a broadcast company, other entities may own <u>any</u> minority stake -- even 49.9 percent -- without having the control necessary to influence the broadcaster's programming. No such provision exists in the cable/telco rules, because a telco's incentive and ability to favor an affiliated cable system do not depend on the telco's ability to <u>control</u> the cable system.

Section 628 has a different purpose than that of either the broadcast ownership rules or the cable/telco cross-ownership rule, and a different attribution standard is appropriate. The concern underlying this section is not that a cable operator with an ownership interest in a program network will influence the programming of that network. Nor is it that such a cable operator will have some incentive and ability to favor its affiliated programmer. Rather, it is the other way around: that a

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15/ Id.

programmer that is owned by a cable operator will have an incentive to favor that cable operator at the expense of other distributors.

The level of cable operator ownership necessary to give a cable programmer such an incentive seems obviously greater than the level necessary to give rise to the concerns embodied in the broadcast and cable/telco cross-ownership rules. The direct financial impact on a programmer that discriminated against certain distributors to favor its own affiliated distributor would be much greater than the corresponding impact on a broadcaster that simply chose to take into account the programming preferences of a minority shareholder. There may be reasons why dealing exclusively with a particular cable operator, or giving that operator favorable terms, ultimately <u>increases</u> the sales and distribution of a programmer's product -- in which case, the programmer would engage in such conduct regardless of any ownership affiliation with the cable operator. But, absent such pro-competitive reasons for engaging in such conduct, a programmer that chose to favor an affiliated cable operator by restricting sales to other distributors would suffer a direct loss of sales and revenues.

Accordingly, to gain such favorable treatment and to give programmers an incentive to incur such losses, a cable operator would have to have a very substantial ownership interest in the program -- an interest reflecting real control. Five percent is far too low a threshold for such purposes. At a minimum, actual voting control (50 percent ownership), or some evidence of working control, should be required before a cable operator is deemed to have an attributable interest in a programmer for purposes of Section 628.

III. DISCRIMINATION IN PROGRAM DISTRIBUTION

A. A Three-Step Approach Is Necessary

Section 628(c) of the Act requires the Commission to specify in its rules that discrimination by a vertically integrated programmer among multichannel distributors with respect to price, terms and conditions must, under certain circumstances, be deemed unfair conduct. This does not mean that such "unfair" conditions will always be unlawful. As discussed above, the Act prohibits unfair conduct only to the extent that it significantly hinders or prevents a distributor from providing multichannel programming to subscribers.

Therefore, the Commission suggests that a "two-step approach" is necessary and appropriate for evaluating complaints of discriminatory behavior.[16/] The first step is to determine whether particular differences in prices, terms or conditions constitute unjustifiable and unfair discrimination, under the criteria set forth in Section 628(c). The second step is to determine whether the allegedly unfair discrimination has prevented or significantly hindered the complainant in providing satellite programming to consumers.

16/ Notice, para. 16.

Actually, a <u>three</u>-step approach is necessary. Before deciding whether a particular difference in the price, terms, or conditions of sale of programming is unjustified and whether it has significantly hindered a competitor, the Commission must first determine whether a difference really exists -- or whether, taken as a whole, the price, terms, and conditions, though not identical for each buyer, are <u>comparable</u>.

Program contracts between programmers and cable operators and other distributors are not standardized; they are negotiated. Not only their prices but also their terms and conditions are likely to vary widely. There is no indication that Congress intended that the Commission replace the negotiation of individual contracts with standardized prices, terms, and conditions. Indeed, such standardization could facilitate price standardization <u>among</u> programmers, reducing competition and resulting in higher prices for all multichannel distributors and, ultimately, for consumers. To the extent that contracts are to be negotiated individually, differences in particular terms and conditions -- and even differences in prices -- cannot reasonably be viewed as discriminatory unless, as a threshold matter, a complaining party establishes that its contractual terms with a programmer and the contractual terms between the programmer and another multichannel provider not only are different but also are not comparable.

B. A Zone Of Presumptively Reasonable Price Differences Should Be Established.

The fact that contracts are (and should be) negotiated rather than standardized, so that their terms are likely to vary widely, provides good reason for adopting the Commission's proposal to establish a presumptively "reasonable region of price differentials."[17/] Such a zone of reasonableness is necessary to take into account the fact that price is but one component of a negotiated contract between programmers and multichannel distributors. Many differences in prices are likely to be offset by countervailing differences in other terms and conditions -- particularly where the differences in prices are not extreme. Allowing a reasonable region of price differences will eliminate the need for the Commission to resolve complaints where there is a strong likelihood that, taken as a whole, the price, terms, and conditions of the contracts at issue will be found to be reasonably comparable and not discriminatory.

The Commission offers two other persuasive reasons of its own for establishing such a zone of presumptive reasonableness. First, the Act itself acknowledges that differences in prices, terms and conditions can be wholly legitimate, and there are a wide range of justifications for such differences. Differences in the costs and benefits of dealing with different distributors are almost certain to result in at least some wholly justified

17/ Notice, para. 20.

differences in the prices charged to such distributors. A zone of presumed reasonableness would simply reflect this likelihood.

Second, the fact that prices are rarely identical among program contracts means that, unless a zone of presumptively reasonable differences is established, the Commission would be swamped with complaints seeking identical rates. These complaints would impose a substantial burden on the Commission -- a burden that cannot be justified, given the likelihood that most of the relatively small price differences at issue in these complaints will ultimately be shown to be justifiable.

Yet another reason for establishing a zone of reasonableness is that, whether or not a particular price differential is justified, that differential is unlikely to result in substantial competitive injury to a programmer unless it is of significant magnitude. There is no reason for the Commission to adjudicate whether a differential is "unfair" or "unjustified" under Section 628(c) if the magnitude of the differential is too small to be likely to cause the sort of harm required for liability under Section 628(b).[18/]

One possible way to determine an appropriate zone of reasonableness would be to examine the price differentials in contracts

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18/ For similar reasons, courts applying the Robinson-Patman Act's prohibition on price discrimination -- which also requires, for liability, at least a _possibility_ of competitive injury -- require more than a _de minimis_ differential before they will infer a likelihood of competitive impact. _See e.g.,_ ABA Antitrust Section, _Antitrust Law Developments_ 416 n.105 (3d ed. 1992)